## United States Government National Labor Relations Board OFFICE OF THE GENERAL COUNSEL

## Advice Memorandum

DATE: January 29, 2010

TO : Martin M. Arlook, Regional Director

Region 10

FROM : Barry J. Kearney, Associate General Counsel

Division of Advice

SUBJECT: HMS Host International, Inc.

Case 10-CA-38106

This case, which arises from the dispute between Unite/Here and Workers United, affiliated with the SEIU, was submitted for advice to determine whether the Employer violated Section 8(a)(5) by refusing to recognize the Southern Regional Joint Board as the Section 9(a) representative of the Employer's bargaining unit employees, and by refusing to remit dues to that union.

We conclude that the Employer did not violate Section 8(a)(5) because Unite/Here, and not the Southern Regional Joint Board, is the Section 9(a) representative of these employees.

## **FACTS**

In 2004, the international unions of UNITE and HERE merged and became Unite/Here (the International). After the merger, the International successfully campaigned to secure a card check neutrality agreement from Host, the Employer, which the parties signed on April 24, 2006. An International representative signed the agreement. Pursuant to that agreement, the International commenced an organizing campaign and, with the assistance of the Southern Regional Joint Board (Joint Board), solicited authorization cards from the bargaining unit employees. According to the Joint Board, while soliciting cards one of its volunteer organizers "told employees all about" the Joint Board. The cards were entitled "UNITE HERE Organizing Card" and stated, among other things, that the employee accepted membership in UNITE HERE and "authorize UNITE HERE to represent me in negotiations . . . . " After obtaining cards from a majority of employees, the parties proceeded to a card check verification and a neutral

arbitrator certified the International as the employees' bargaining representative.

Following the certification, the parties commenced negotiations for their first collective-bargaining agreement. The negotiations were led by Harris Raynor, who held the title of International Vice President and Director of the Joint Board. Raynor was assisted in negotiations by the International's Director of Laundry and Food Service. The parties reached an agreement, effective from April 2, 2007 through April 1, 2010, that recognizes the International as the collective bargaining representative. The signature page indicates the International's agreement and it was signed by Raynor as "Southern Regional Director/International Vice President of UNITE HERE."

Once the agreement was signed, the Joint Board took over the day-to-day servicing of the unit. At one point, Raynor contacted the International's Director of Laundry and Food Service to ask about the dues structure. The International responded that "the dues are totally your call. They'll be your member[s]." According to another International representative, their practice is to be involved at the local level in organizing and initial bargaining, and then during the contract term the International's involvement is limited to significant policy or administrative issues, such as the pension plan. The International representatives also become involved when there is bargaining for a contract renewal.

The Joint Board provided emails and documents showing their day-to-day involvement with servicing the unit. Many of the emails include International representatives on the cc: line. The other documents -- most of which are communications with the Employer to excuse certain employees from work to attend union meetings -- are all on Unite Here letterhead.

On March 7, 2009, the Joint Board voted to disaffiliate from the International, and approximately two weeks later voted to join Workers United, which eventually became affiliated with SEIU.<sup>1</sup> On May 20, the Employer

<sup>&</sup>lt;sup>1</sup> The investigation revealed that Local 2295 also voted to disaffiliate, but there is nothing in the record establishing the presence of a local prior to this time.

informed Workers United that it would no longer deal with its representatives, and it began escrowing dues that were formerly paid to the Joint Board.

As of June, 2009, the International has taken over the day-to-day administration of the contract and servicing of the bargaining unit.

## ACTION

We conclude that the International has been and continues to be the exclusive Section 9(a) representative of the Employer's employees. Accordingly, the Region should dismiss the charge, absent withdrawal, because the Employer had no obligation to bargain with or remit dues to the Joint Board after the disaffiliation.

An employer's obligation to bargain extends only to the statutory representative selected by a majority of the unit employees.<sup>2</sup> While the Section 9(a) representative may delegate some authority to an agent to act on its behalf, it cannot delegate all its responsibilities to another union and demand that the employer bargain with that union.<sup>3</sup> The Board has found an improper delegation of representation where there had been a wholesale substitution of another union for the designated Section 9(a) representative.<sup>4</sup>

<sup>&</sup>lt;sup>2</sup> See, e.g., <u>Nevada Security Innovations</u>, <u>Ltd.</u>, 341 NLRB 953, 955 (2004).

<sup>&</sup>lt;sup>3</sup> Compare Nevada Security Innovations, Ltd., 341 NLRB at 953, fn.1, 955-956 (employer violated Section 8(a)(5) by refusing to bargain with certified representative, the international, where the international had merely delegated some of its duties to its local); Mountain Valley Care & Rehabilitation Center, 346 NLRB 281, 282-283 (2006) (same); with Goad Co., 333 NLRB 677, fn.1, 679-680 (2001) (where Section 9(a) representative improperly sought to transfer all its representational responsibilities to its sister local, the employer lawfully refused to bargain with the sister local).

<sup>&</sup>lt;sup>4</sup> See <u>Goad Co.</u>, 333 NLRB at 679-680 (agreement between Section 9(a) representative and its purported "agent" "stands the law of agency on its head" by absolving the principal for the actions of its own purported agent and confirmed that the principal was "bowing out" of its

At the same time, another union can acquire the status of a joint Section 9(a) representative based upon the parties' conduct. For example, in American Medical Response, the Board found that although the recognition agreement named only the international, the local was a joint representative where the local also was a party to the collective-bargaining agreement, the local maintained and enforced that agreement, the dues authorization cards identified the local as the bargaining representative, and both the local and the international were going to participate in upcoming negotiations.6

Here, the International has been and remains the employees' Section 9(a) representative. The evidence establishes that, during the merger period, rather than supplanting the International through an improper delegation of representational responsibilities, or even attaining joint representative status with the International, the Joint Board was the International's designated agent in servicing the bargaining unit on a day-to-day basis.

representational duties); Sherwood Ford, Inc., 188 NLRB 131, 133-134 (1971) (resolution provided that Section 9(a) representative would carry out instructions of its purported agent, and "it was there that the switch became manifest, for the dog had now become the tail").

<sup>5</sup> See, e.g., Mail Contractors of America, Inc., 346 NLRB 164, 167 (2005) ("weight of the evidence" arguably established that international and local were recognized as joint representatives at first bargaining session, where contract language made both parties to the collective-bargaining agreement); Tree-Free Fiber Co., 328 NLRB 389, fn.4, 397-98 (1999) ("longstanding past practice" established international and its two locals were joint collective-bargaining representatives where contract named two signatory locals in recognition clause but was also executed by International, contractual grievance procedure provided for international's involvement, and international historically participated in contract negotiations).

 $^6$  335 NLRB 1176, 1178-79 (2001) (local and international both held liable as joint representatives for Section 8(b)(1)(A) and (2) violations based upon their extension of contract to employees improperly accreted into the bargaining unit).

The International's status as the Section 9(a) representative is demonstrated by the fact that the International entered into the neutrality agreement with the Employer, the authorization cards named the International, the International ran the organizing campaign with the Joint Board's assistance, and the International provided guidance and assistance to Raynor during the negotiations. Significantly, the contract named the International in the recognition clause of the resulting contract, and the signature page identified the International as the party agreeing to its terms.

The manner in which Raynor signed the collective-bargaining agreement only bolsters this conclusion. The title appearing beneath his signature reads "International Vice President, Director Southern Region." This double title evinces his role as an agent of the International, as well as the Joint Board, and also illustrates the International's intent to maintain its representational status. It would also reinforce the Employer's and employees' understanding that the International remained the 9(a) representative and that Raynor was acting on behalf of the International.

Moreover, the fact that the Joint Board handled the day-to-day administration of the contract does not undermine the International's claim to 9(a) status. As one representative explained, the International's practice is to be involved at the local level in organizing and initial bargaining, and to get involved when significant policy or administrative issues arise. There is nothing about this delegation that indicates a desire by the International to "bow out."

It is also clear that the International remained the 9(a) representative after the Joint Board disaffiliated.

<sup>&</sup>lt;sup>7</sup> We reject the Joint Board's alternative argument that it was, at least, a joint representative with the International. In cases where the Board found joint representation, the putative joint representative was included in the recognition clause of a contract and, in some cases, also named on the authorization cards. See cases cited at fn. 5, supra.

An employer's obligation to recognize and bargain with the incumbent union following a change in affiliation continues "unless the changes resulting from the merger or affiliation are so significant as to alter the identity of the bargaining representative." In determining whether there is "substantial continuity" in representation, the Board examines "the totality of the circumstances," and considers a number of factors, including the union officials' responsibilities, membership rights and duties, the dues/fees structure, governing documents, the manner in which contract negotiations and administration are handled, and the representative's assets. 10

Here, we conclude that there was substantial continuity of the International's representation after the Joint Board disaffiliated. Granted, the employees and Employer would have been accustomed to the faces of Joint Board representatives in their day-to-day dealings with matters concerning the unit employees' terms and conditions of employment. However, as noted above, the International never abandoned its representational status, and it maintained a presence through its designation as the recognized union in the contract and its appearance on the letterhead of correspondence with the Employer. Moreover, after the Joint Board disaffiliated in March, 2009, and the Employer ceased dealing with it on May 20, the International stepped in in June to fulfill the daily administration of the contract. There is no evidence of any changes to membership rights and duties, the dues/fee structure, or the governing documents. In sum, the totality of the circumstances demonstrate continuity of representation by the International.

Since the International remains the 9(a) representative of the Employer's bargaining unit employees,

Raymond F. Kravis Center for the Performing Arts, 351 NLRB 143, 147 (2007), enfd. 550 F.3d 1183 (D.C. Cir. 2008).

<sup>&</sup>lt;sup>9</sup> Mike Basil Chevrolet, 331 NLRB 1044, 1044 (2000) (amending certification to reflect change in affiliation).

<sup>10</sup> See Western Commercial Transport, 288 NLRB 214, 217 (1988) (dismissing petition to amend certification where affiliation effected "dramatic change" in the bargaining representative).

the Employer had no obligation to bargain with or remit dues to the Joint Board after it disaffiliated from the International. Accordingly, the Region should dismiss the charge, absent withdrawal.

/s/ B. J. K.